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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

LATROBE BREWING CO., LABATT IMPORTERS, INC., LABATT'S U.S.A., INC. AND JOHN P. O'CONNELL,

*Petitioners,*

vs.

TONY SAVATT, INC.,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Pennsylvania Superior Court erred in finding that the Pennsylvania Legislature intended that the good cause provisions of the 1980 Amendments to the Pennsylvania beer distributorship franchise law be applied retroactively to preexisting distribution agreements?

2. Whether the Pennsylvania Superior Court's retroactive application of the good cause provisions of the 1980 Amendments to preexisting distributor agreements expressly providing for termination without cause constituted an unconstitutional impairment of contract rights, in violation of the Contracts Clause of the United States Constitution?

3. Whether the Pennsylvania Superior Court erred in following a *per se* rule

to the effect that the power of the states to enact liquor legislation pursuant to the Twenty-First Amendment supersedes the protections of the Contracts Clause against the impairment of vested contract rights?

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
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Petitioners, Latrobe Brewing Co., Labatt Importers, Inc., Labatt's U.S.A., Inc. and John P. O'Connell[1] respectfully pray that a writ of certiorari issue to

[1] Statement Pursuant to Supreme Court Rule 29.1. Petitioners are Latrobe Brewing Company, Labatt's U.S.A., Inc., Labatt Importers, Inc. and John O'Connell. Petitioners Latrobe Brewing Company, Labatt's U.S.A., Inc. and Labatt Importers, Inc. are each wholly-owned subsidiaries of John Labatt, Inc. John Labatt, Inc. is a wholly owned subsidiary of John Labatt, Limited.

review the judgment and opinion of the Superior Court of Pennsylvania, Pittsburgh District entered on November 2, 1990. The Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal by order entered July 3, 1991.

**OPINIONS BELOW**

The order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal (App. A, *infra.*, 1a) is not reported. The opinion of the Superior Court of Pennsylvania (App. B, *infra.*, 2a-13a) appealed from is reported at 400 Pa. Super. 296, 583 A.2d 796 (1990) rearg. denied (1991). The trial court's opinion dated December 21, 1989 confirming its orders is not reported. The trial court's adjudication and order of August 2, 1989 (App. C, *infra.*, 14a-33a) is not reported. The trial court's order dated

April 4, 1989 denying a preliminary injunction is not reported.

## JURISDICTION

The order of the Supreme Court of Pennsylvania denying a Petition for Allowance of Appeal was entered July 3, 1991. The Pennsylvania Superior Court decision appealed from was entered November 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 10, of the Constitution of the United States provides in pertinent part:

> No State shall ... pass any ... law impairing the obligation of contracts ...

The Twenty-First Amendment to the Constitution of the United States provides, in pertinent part:

> The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is prohibited.

**STATUTES INVOLVED**

Section 4-431(d)(1) of the Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, §4-431(d)(1) (Purdon Supp. 1991) provides in pertinent part:

> All distributing rights as hereinabove required ... shall not be modified, cancelled, terminated or rescinded by the manufacturer without good cause ... "Good cause" shall mean the failure by any party to an agreement, without reasonable excuse or justification, to comply substantially with an essential, reasonable and commercially acceptable requirement imposed by the other party under the terms of the agreement.

Section 4-431(d)(2) of the Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, §4-431(d)(2) (Purdon Supp. 1991) provides:

> After January 1, 1980, no manufacturer shall enter into

> any agreement with more than one distributor or importing distributor for the purpose of establishing more than one agreement for designated brand or brands of malt or brewed beverages in any one territory. Each franchise territory which is granted by a manufacturer shall be geographically contiguous.

Section 4-431(d)(5) of the Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, §4-431(d)(5) (Purdon Supp. 1991) provides:

> The provisions of this subsection shall not apply to Pennsylvania manufacturers whose principal place of business is located in Pennsylvania unless they name or constitute a distributor as a primary or original supplier of their products subsequent to the effective date of this act, or unless the Pennsylvania manufacturers have named or constituted a distributor or importing distributor as a primary or original supplier of their products prior to the effective date of this act, and which status is continuing when this act becomes effective.

## STATEMENT OF THE CASE

In 1977, by written agreement, Latrobe Brewing Company ("Latrobe"), an in-state Pennsylvania manufacturer of beer products, named Tony Savatt, Inc. ("Savatt") a "primary" distributor of Latrobe products in Allegheny County, Pennsylvania (the "1977 Agreement"). The 1977 Agreement expressly provided that the distributorship could be cancelled immediately upon written notice by either party.

In 1980, the Pennsylvania Liquor Code ("Liquor Code") was amended to add several provisions regulating the relationship between beer manufacturers and their distributors (the "1980 Amendments"). Prior to the 1980 Amendments, there had been no statutory limitation on the right of beer manufacturers and distributors to contract freely to allow termination of

beer distributorships without cause. However, the 1980 Amendments, for the first time, prohibited a manufacturer's termination of a beer distributorship absent "good cause".

The 1980 Amendments also created a unique exemption to this good cause requirement. The exemption was available only to those manufacturers whose principal place of business was located in Pennsylvania, such as Latrobe (the "Pennsylvania Manufacturers Exemption"). The intent of the Pennsylvania Legislature in enacting the Pennsylvania Manufacturers Exemption was to allow Pennsylvania manufacturers to maintain a competitive advantage against their out-of-state counterparts, by retaining the ability to freely control and make changes in their beer distribution network. In order to take advantage of this unique exemption, a

Pennsylvania manufacturer had to designate itself as "primary" distributor of its own products, and designate its distributors as "secondary" distributors of its products.

To afford Pennsylvania beer manufacturers the opportunity to conform their written distribution agreements to the 1980 Amendments, and thereby avail themselves of the Pennsylvania Manufacturers Exemption, the 1980 Amendments were not made effective for a period of sixty days after being signed into law. Taking advantage of the sixty day grace period, Latrobe designated itself as the "primary" distributor of its own products within the Commonwealth of Pennsylvania, and entered into a new agreement with Savatt which designated Savatt a "secondary" distributor for Latrobe products in Allegheny County (the

"1980 Agreement"). In language identical to that found in the 1977 Agreement, the 1980 Agreement also expressly stated that "[t]his Agreement may be cancelled immediately upon written notice by either party."

By letter dated July 28, 1988, Latrobe notified Savatt of its termination as a secondary distributor of Latrobe products.

Savatt commenced this action on August 12, 1988, alleging that notwithstanding the 1980 Agreement designating it a secondary distributor, it had been a primary distributor of Latrobe products continuously since 1977, and therefore, under an exception to the Pennsylvania Manufacturers Exemption, could not be terminated without cause.

Defendants filed an Answer and New Matter denying that Savatt was a primary

distributor, and stating the affirmative defense that the imposition of the good cause requirement would constitute an impairment of Latrobe's rights under the 1980 Agreement, in violation of Article I, Section 10 of the United States Constitution (the "Contracts Clause") and Article I, Section 17 of the Pennsylvania Constitution. By order dated April 4, 1989, the trial court denied Savatt's request for a preliminary injunction. Subsequently, by order dated August 2, 1989, the trial court held that notwithstanding the designation of Savatt as a secondary distributor in the 1980 Agreement, Savatt was a primary distributor both before and after the effective date of the 1980 Amendments, and found in Savatt's favor. (Appendix C, pp. 30a-31a).

On appeal, Latrobe again denied that Savatt was a primary distributor, and argued that the 1980 Amendments were not intended to be applied retroactively. Latrobe further argued that in order for the 1980 Amendments to apply to the Latrobe-Savatt relationship, the good cause provisions would have to be retroactively applied. Such retroactive application of the good cause requirement would act as an impairment of Latrobe's significant express right under the 1980 Agreement to terminate without cause, in violation of the Contracts Clause.

The Pennsylvania Superior Court, however, affirmed the judgment of the trial Court (order dated November 2, 1990; reargument denied by order dated January 14, 1991), finding that notwithstanding the 1980 Agreement appointing Savatt a secondary distributor, the actual

relationship between Latrobe and Savatt had not changed after the enactment of the 1980 Amendments, so that Savatt remained a primary distributor. (Appendix B, pp. 10a-11a). Therefore, the good cause provisions of the 1980 Amendments could be applied retroactively to the preexisting primary distributor relationship. (Appendix B, p. 12a). The Court reasoned that there is no constitutional right to engage in the liquor business, and therefore the concept of retroactivity has no application to this case. (Appendix B, pp. 12a-13a). The Court further found that the Legislature had intended to allow retroactive application of the good cause provisions against in-state Pennsylvania manufacturers. (Appendix B, p. 12a).

Thereafter, Latrobe petitioned the Supreme Court of Pennsylvania for an Allowance of Appeal, once again arguing:

(i) that the Pennsylvania legislature did not intend that the 1980 Amendments be retroactively applied; (ii) that a retroactive application of the good cause provisions impaired Latrobe's vested contractual rights under the Contracts Clause; (iii) that the Superior Court's decision discriminated against in-state manufacturers; and (iv) that the concept of retroactivity applies to liquor cases. By order dated July 3, 1991, the petition was denied.[2] (Appendix A, p. 1a).

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[2] The above issues were raised and preserved for appeal in petitioners' Answer and New Matter, petitioners' Memorandum of Law in Response to Motion of Tony Savatt, Inc. for a Preliminary Injunction, petitioners' Supplemental Memorandum of Law in Response to Plaintiff's Motion for an Injunction, petitioner's Proposed Findings of Facts and Conclusions of Law to the trial Court, petitioners' Motion for Post-Trial Relief to the trial Court, petitioners' Brief on Appeal to the Superior Court of Pennsylvania, and petitioners' Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.

## REASONS FOR GRANTING WRIT

This is the first known case to be presented to this Court in which a state appeals court has not only recognized the retroactive application of a good cause provision in a newly-enacted alcoholic beverage franchise law, but has also held that the good cause provision may be retroactively applied only against one class of manufacturers, in this case in-state Pennsylvania brewers. Notably, in enacting this law, the Pennsylvania legislature had deliberately structured the 1980 Amendments to provide Pennsylvania manufacturers with an exemption from the good cause provision, in order to give them a competitive advantage over out-of-state manufacturers. Ironically, the decision of the Pennsylvania Superior Court has the perverse effect of defeating the intent of

the Pennsylvania legislature, by subjecting in-state manufacturers to the good cause provisions, while exempting their out-of-state counterparts from the same provisions.

The Superior Court's decision is based on the principle that the private rights of parties in the liquor business fly out the window when the states exercise their power to regulate traffic in alcoholic beverages under the Twenty-First Amendment to the United States. Constitution. Federal and State Courts have repeatedly held in the strongest of terms that this is an incorrect application of constitutional law.

As discussed below, the decision of the Pennsylvania Superior Court is contrary to the overwhelming weight of authorities, and this Court should grant review so as to prevent the improper

deprivation of important private constitutional rights.

A. The Pennsylvania Superior Court Incorrectly Found That The Good Cause Provision Was Intended To Apply Retroactively.

In analyzing whether any legislation may be applied retroactively, it must first be determined whether the legislation was intended to apply retroactively. If it can not be determined clearly and manifestly that a legislative enactment is intended to apply retroactively, it may not be. DeVargas v. Mason & Hanger-Silas Mason, 911 F.2d 1377, 1388 (10th Cir. 1990), cert. denied, 111 S. Ct. 799 (1991). Krenzelak v. Krenzelak, 503 Pa. 373, 380, 469 A.2d 987, 990 (1983); 1 Pa. Cons. Stat. Ann, §1926 (Purdon Supp. 1991).

Prior to the Pennsylvania Superior Court's decision, each and every Court

examining the 1980 Amendments, and in particular the good cause provision, found no evidence of any intention of the Pennsylvania legislature to apply the Amendments retroactively. This issue was first examined in Centre Beverage Co. v. Miller Brewing Co., 779 F.2d 168 (3d Cir. 1985). In that case, both the U.S. District Court and the Third Circuit Court of Appeals refused to apply the good cause provision retroactively against an out-of-state beer manufacturer exercising its right, under a 1964 distribution agreement, to terminate a Pennsylvania distributor without cause. Following an exhaustive analysis of the legislative history, the Third Circuit, while stating that arguments could be made for applying the 1980 Amendments retroactively, could find no manifest intent expressed by the

Legislature that the statute should be so applied.

Thereafter, in Rudolph Rosa, Inc. v. Latrobe Brewing Co., 347 Pa. Super. 551, 500 A.2d 1194 (1985), alloc. denied (1986), the Pennsylvania Superior Court was presented with the identical Latrobe Brewing Company agreements at issue in this action. Once again, following a lengthy analysis of legislative intent, the Court refused to apply the good cause provisions against Latrobe, stating that the Pennsylvania legislature had not "expressly made...[the] substantive provisions of the amendatory statute retroactive." Id. at 563, 500 A. 2d at 1200. The Superior Court further held that "[w]here the application of a statute would make a substantive change in the rights and obligations of the parties, it is presumed that the legislature intended

its provisions to have no application to contracts existing prior to the effective date of the law". Id. at 562, 500 A.2d at 1200.

In L&M Beverage Co. v. Anheuser-Busch, Inc., No. 85-6937, 1987 WL 16682 (E.D. Pa. Sept. 9, 1987) (Appendix F, pp. 54a-76a), the U.S. District Court again found no intent on the Pennsylvania legislature's part to apply the good cause provisions to an out-of-state beer manufacturer with a preexisting contractual right of termination, and upheld the manufacturer's termination without cause.

Now, for the first time, the Pennsylvania Superior Court has found that the Pennsylvania legislature clearly manifested an intent to apply the good cause provisions retroactively against in-state Pennsylvania manufacturers under

certain circumstances. This finding is contrary to the overwhelming weight of authority, is supported nowhere in the legislative history, and provides an improper basis for the Superior Court's decision to allow the good cause provisions to be so applied.

B. The Retroactive Application of the Good Cause Provisions Violates the Contracts Clause of the U.S. Constitution.

Even assuming the Pennsylvania Legislature had intended the good cause provisions to be retroactively applied, the overwhelming weight of authority states that such application would violate Latrobe's rights under the Contracts Clause. Good cause provisions have been repeatedly found to work a substantial impairment of a liquor supplier's preexisting right to terminate a distribution relationship at will, and

such private right is not overcome by any countervailing governmental interest.

The purpose of the Contracts Clause is "to encourage trade and credit by promoting confidence in the stability of contractual obligations." United States Trust Co. v. New Jersey, 431 U.S. 1, 15, 52 L.Ed 2d 92, 105, 97 S. Ct. 1505, (1977) reh. denied 431 U.S. 975, 53 L.Ed 2d 1073, 97 S. Ct. 2942 (1977). Stability is promoted when the contractual rights and obligations of individuals are "binding under the law, and the parties are entitled to rely on them." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245, 57 L.Ed 2d 727, 737, 98 S. Ct. 2716 (1978).

In Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 74 L.Ed 2d 569, 580-581, 103 S. Ct. 697 (1983), this Court articulated a

three-step analysis to determine whether new enactments may be retroactively applied, the first two of which are significant here: (i) whether the challenged statute has operated as a substantial impairment of a significant private contract; and (ii) whether a significant and legitimate public purpose underlies the statute.

At least fourteen Courts have considered these factors and refused, on Contracts Clause grounds, to apply liquor code enactments retroactively against a manufacturer's preexisting contractual right to terminate or otherwise control liquor distributorships.[3] In each case,

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[3] See e.g., Rudolph Rosa, Inc. v. Latrobe Brewing Co., 247 Pa. Super. 551, 500 A.2d 1194 (1985) alloc. denied (1986); Centre Beverage Co., v. Miller Brewing Co., 779 F.2d 168 (3d Cir. 1985); L&M Beverage Co., v. Anheuser-Busch, Inc., No. 85-6937, 1987 WL 16682 (E.D. Pa. Sept. 9, 1987) (Appendix F,

the Court held that retroactive application would significantly impair a substantive vested contractual right. See, e.g., Centre Beverage, supra, 779

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(Footnote 3 continued):
pp. 54a-76a); Larco Distributing, Inc. v. Latrobe Brewing Company, No. 91-3045 (10th Cir. Aug. 15, 1991) (Appendix E, pp. 45a-53a); Excello Wine Co. v. Monsieur Henri Wines, Ltd., 474 F. Supp. 203 (S.D. Ohio 1979); Beer Wholesalers, Inc. v. Miller Brewing Co., 426 N.W.2d 438 (Minn. App. 1988), cert. denied, 489 U.S. 1039, 103 L.Ed 2d 235, 109 S. Ct.1173 (1989); Park Benziger & Co., v. Southern Wine & Spirits, Inc., 391 So.2d 681 (Fla. 1980); Globe Liquor Co., v. Four Roses Distillers Co., 281 A.2d 19 (Del. Supr. 1971), cert. denied, 404 U.S. 873, 30 L.Ed 2d 117, 92 S. Ct. 103 (1981); Heublein, Inc. v. Department of Alcoholic Beverage Control of Virginia, 237 Va. 192, 376 S.E.2d 77 (1989); Birkenwald Distributing Co. v. Heublein, Inc., 55 Wash. App. 1, 776 P.2d 721 (1989); United States Brewers' Assoc., Inc., v. State, 192 Neb. 328, 220 N.W. 2d 544 (1974); H. Phillips Co., Inc. v. Brown-Forman Distillers Corp., 483 F. Supp. 1289 (W. D. Wis. 1980); Southwest Distributing Co., v. Olympia Brewing Co., 90 N.M. 502, 565 P.2d 1019 (1971); Jacobsen v. Anheuser Busch, Inc., 392 N. W.2d 868 (Minn. 1986) cert. denied 479 U.S. 1060, 93 L.Ed 2d 991, 107 S. Ct. 941 (1987).

F.2d at 169, stating that "[i]f the 1980 Amendment requiring good cause were applied to the Centre Beverage/Miller Agreement, Miller's substantive right to terminate the agreement at will would be significantly changed." Similarly, in Rosa, supra, the Pennsylvania Superior Court held that: "new laws which have the effect of adding requirements or limiting the reasons for terminating franchise or distributing rights agreements are to be deemed to effect substantive changes and not merely procedural changes." 347 Pa. Supr. at 562, 500 A.2d at 1200. In addition, these Courts have consistently held that good cause provisions in liquor franchise laws do not serve a significant public purpose. While it is widely recognized that liquor regulation is often necessary to meet important general social problems, such as temperance, Courts have

repeatedly rejected the argument that good cause provisions fall into this category. As stated in Jacobsen v. Anheuser Busch, Inc., 392 N.W.2d 868 (Minn. 1986), cert. denied, 479 U.S. 1060 (1987), applying the Energy Reserves test:

> Indeed, an examination of the legislative history reveals that this legislation arose not in response to any broad and general or economic problem, but rather at the instigation and promotion of beer distributors. The prime arguments of sponsors for its enactment on the floors of the legislature demonstrate this was an act promoted by and to serve wholesale beer distributors.
>
> We can ascertain "no significant or legitimate public purpose" in the act.
> While it may remedy a perceived problem of beer wholesalers, it was obviously not intended to remedy a "broad and general social or economic problem"....
> 392 N.W. 2d at 875.

Thus, the Pennsylvania Superior Court erred when it found that the good cause

provisions could be retroactively applied to impair Latrobe's substantive contractual termination right. As a matter of law, Latrobe's private rights under the Contracts Clause have been violated, and a writ should be granted to right a significant constitutional wrong.

C. The Superior Court's Retroactive Application of the 1980 Amendments Discriminates Against In-State Pennsylvania Manufacturers, Contrary to the Express Intent of the Pennsylvania Manufacturers Exemption.

In order to justify a retroactive application of the good cause provisions, the Pennsylvania Superior Court was forced to rely on a convoluted interpretation of the Pennsylvania Manufacturers Exemption. The Court, following its earlier decision in Matt Lamb & Sons, Inc. v. Christian Schmidt Brewing Co., 336 Pa. Super. 34, 485 A.2d 836 (1984) (a case which did not

address the question of retroactivity), ignored the preexisting written contract between Latrobe and Savatt providing that Savatt was a "secondary" distributor of Latrobe products, terminable without cause, and subjected the parties' actual business relationship to a microscopic analysis to determine whether Savatt was truly acting as a "secondary" distributor. Finding that the business relationship of the parties had not changed along with the change in written agreements, the Court held that Savatt was continuing to act as a "primary" distributor of Latrobe products.[4] Therefore, under an

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[4] In so holding, the Superior Court also ignored the testimony of Latrobe's former Vice President that Savatt could not have been a legal "primary" distributor under the 1980 Amendments, because it had not been assigned an exclusive geographical territory in accordance with Section 4-431(d)(2) of the Liquor Code.

"exception" to the Pennsylvania Manufacturers Exemption, Latrobe could not take advantage of the Exemption, and the good cause provisions could be retroactively applied to the preexisting "primary" distributor relationship, even though that relationship had been made expressly terminable at will.

In determining that the Latrobe-Savatt relationship was the same after the enactment of the 1980 Amendments as before, the Superior Court missed the point. Whether or not the day-to-day business relationship was the same, the parties' express written agreement provided that the distributorship could be terminated without cause. The ability to apply a statute retroactively is determined under the Contracts Clause, and involves an examination whether a substantive contractual right is being

substantially impaired. The Superior Court's decision ignores the fact that Latrobe's preexisting contracts expressly reserved an important substantive contract right--the right to terminate Savatt's distributorship at will. Indeed, Savatt had the same contractual right. Notably, the written distributor agreements at issue in Matt Lamb contained no such express provision allowing termination at will.

The Superior Court's construction turns the Pennsylvania Manufacturers Exemption on its head. In reaching its determination, the Court applied the Pennsylvania Manufacturers Exemption against Latrobe, when the intent of the Exemption was to help Latrobe.

The purpose of the Manufacturers Exemption was to allow Pennsylvania brewers to avoid the good cause provisions

of the 1980 Amendments. A Pennsylvania brewer could manifest its intent to take advantage of the Exemption by changing its written agreement with wholesalers prior to the effective date of the act. Rosa, supra. 347 Pa. Super at 563, 500 A.2d at 1200. This Latrobe did. Nothing in the 1980 Amendments or the legislative history indicates that the parties had to change their actual relationship or their method of doing business in order to avail themselves of the Exemption.

In sum, instead of being aided by the Pennsylvania Manufacturers Exemption, Latrobe has been penalized by it. Out-of-state manufacturers, unable to avail themselves of the Pennsylvania Manufacturers Exemption, stood pat, and were therefore able to rely on Contracts Clause protections against retroactive application of the good cause provisions,

without being required to change the actual nature of their business relations with their distributors. At the same time, in-state manufacturers, attempting to avail themselves of the Exemption and avoid the good cause provisions, were unwittingly forced to abandon the same constitutional protections unless they could demonstrate a radical change in the nature of their actual business relations with their distributors, all within the 60 day grace period prior to the effective date of the 1980 Amendments.

The Superior Court has countenanced an unconstitutional retroactive application of the good cause provisions of the 1980 Amendments, and has done so in a discriminatory way, directly contrary to the express intention of the Amendments. This Court should review the Superior Court's anomalous decision.

D. Constitutional Protections Do Not Disappear in Liquor Regulatory Cases.

In determining, against the overwhelming weight of authority, that 1980 Amendments could be applied retroactively, the Pennsylvania Superior Court relied upon an unprecedented per se rule for liquor cases, stating that constitutional protections do not apply when the liquor industry is involved:

> [Retroactive application] is prohibited only if it offends due process, and it offends due process only if, balancing the interests of the parties, the application would be unreasonable. [Citation omitted] The retroactive application is unreasonable only if it impairs a vested right. [Citation omitted]. If, as is true in the field of liquor regulation, there is no constitutional right to engage in the liquor business, the conduct of which is lawful only to the extent permitted by statute, the concept of retroactivity that takes away a right has no application. (Appendix B, pp. 12a-13a).

To the contrary, Courts have repeatedly held that a state's constitutional right to regulate the liquor industry must always be balanced against the private constitutional rights of parties engaged in that business. The Federal Courts have spoken on this issue as recently as August 1991. In Larco Distributing, Inc. v. Latrobe Brewing Company, No. 91-3045 (10th Cir. Aug. 15, 1991) (Appendix E, pp. 45a-53a) in a case involving a preexisting oral beer distribution agreement containing no express termination provision, the Courts refused to apply a Kansas good cause statute retroactively. Notably, both the U.S. District Court and the Tenth Circuit Court of Appeals rejected any per se rule, stating:

> None of the cases cited by Larco provide support for the notion that constitutional guarantees

> fly out the window whenever liquor is mentioned. . . [T]he constitutional prohibition on the impairment of contracts is [not] rendered meaningless because the contract involves the distribution of beer. (Appendix D, p. 41a; Appendix E, p. 49a).

Similarly, in Jacobsen v. Anheuser-Busch, supra, 392 N.W.2d at 872, the Minnesota Supreme Court refused to apply retroactively a new enactment which would have prevented a beer manufacturer from exercising its preexisting contractual right to terminate a distribution agreement upon the distributor's change of ownership. Recognizing that the states have wide latitude to regulate the liquor industry under the Twenty-First Amendment, the Court nevertheless stated:

> "[W]hile the 21st Amendment to the United States Constitution and liquid industry regulations contained in state statutes and regulations may be relevant to the inquiry, they are not dispositive ... Both the Twenty-

> First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of issues and interests at stake in the case. (Citing California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 109, 63 L.Ed. 2d 233, 245, 100 S. Ct. 937 (1980)).

The per se rule has also not been followed in "good cause" cases in other states, again for the reason that good cause provisions were intended to address private economic concerns. See, e.g., Excello Wine Co., v. Monsieur Henri Wines, Ltd., 474 F. Supp. 203 (S.D. Ohio 1979); Park Benziger & Co., v. Southern Wine & Spirits, Inc., 391 So.2d 581 (Fla. 1980); H. Phillips Co., Inc. v. Brown Forman Distillers, 483 F. Supp. 1289 (W. D. Wis. 1980).

It was this same motivation to protect private interests of distributors

that led the Pennsylvania Legislature to enact the good cause provisions of the 1980 Amendments. As stated in Rosa, supra, "Subsection (d) of Section 431 of the Liquor Code sought to regulate distributing rights agreements and protect distributors from becoming totally subservient to the will of the manufacturer."374 Pa. Super. at 560, 500 A.2d at 1198. The 1980 Amendments, and in particular the good cause provisions, were not enacted to principally to protect public health, welfare, peace and morals, as the Pennsylvania Superior Court would have it. (Appendix B, pp. 7a-8a). Rather, these Amendments were economic in nature, seeking only to introduce an element of stability into the supplier/distributor relationship.

The Pennsylvania Superior Court's per se rule is without basis in constitutional

jurisprudence. As this rule goes to the very heart of the Superior Court's decision to allow retroactive application of the good cause provision, review should be granted for this reason alone.

## CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully Submitted,

LOUIS S. EDERER
(Counsel of Record)
MARCY G. STUZIN

CORWIN & SOLOMON P.C.
50 East 42nd Street
New York, New York 10017
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October 1, 1991

# APPENDIX

## APPENDIX A

**The Supreme Court of Pennsylvania Western District**

Charles W. Johns, Esquire
Prothonotary
Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa. 15219
(412) 565-2816

July 9, 1991

Jeffrey C. Hayes, Esquire
Douglas W. Vick, Esquire
PEPPER HAMILTON & SCHEETZ
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799

Louis S. Ederer, Esquire
Marcy G. Stuzin, Esquire
CORWIN & SOLOMON, P.C.
50 East 42nd Street
New York, New York 10017

In Re: Tony Savatt, Inc. v. Latrobe Brewing Co., et al.
No. 87 W. D. Allocatur Docket 1991

Gentlemen and Ms. Stuzin:

The Court has entered the following Orders on your Petition for Allowance of Appeal and Motion to Admit Louis S. Ederer, Esq. Pro Hac Vice in the above-captioned matter:

> "Petition Denied Per Curiam 7/3/91" (Petition for Allowance of Appeal)
>
> "Motion Denied Per Curiam 7/3/91" (Motion to Admit Louis S. Ederer, etc.)

Very truly yours,
/s/Irma T. Gardner
DEPUTY PROTHONOTARY

ITG:cs
cc: Robert J. Cindrich, Esquire
Jon Hogue, Esquire
Hon. John L. Musmanno, A.J. (Silvestri, J.)

## APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

| | | |
|---|---|---|
| Tony Savatt, Inc. | : | |
| | : | No. 1771 |
| v | : | Pittsburgh |
| | : | 1989 |
| Latrobe Brewing Co., Labatt Importers, Inc. etc. | : | |

### ORDER

AND NOW, this 2nd day of November, 1990, it is ordered as follows:

__X__ Order affirmed.

____ Order reversed.

____ Judgment affirmed.

____ Judgment of Sentence affirmed.

____ Judgment of Sentence reversed.

____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

____ Order modified as set forth in opinion filed herewith.

____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

____ Costs to be taxed as provided in opinion filed herewith.

____ Appeal quashed.

BY THE COURT
/s/Eleanor R. Valecko

J. A37029/90

IN THE SUPERIOR COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| TONY SAVATT, INC. | : | |
| v. | : | No. 1771 Pittsburgh, 1989 |
| LATROBE BREWING CO., LABATT IMPORTERS, INC. LABATT'S U.S.A., INC., and JOHN P. O'CONNELL, | : | |
| Appellants, | : | |

Appeal from the Decree of November 3, 1989, docketed November 6, 1989, Court of Common Pleas, Allegheny County, Civil Division at No. G.D. 88-13932.

BEFORE: POPOVICH, JOHNSON and HESTER, JJ.

OPINION BY JOHNSON, J.: FILED: November 2, 1990

This is an appeal from a final decree issued pursuant to the 1980 amendments to the Liquor Code enjoining appellant Latrobe Brewing Company/Labatt's U.S.A. (Latrobe) from terminating Tony Savatt, Inc. as its primary distributor within Savatt's territory. We decide that the contract at issue constituted Savatt as primary distributor, and that therefore the "good cause" requirement for termination of a primary distributor mandated in the Liquor Code at 47 P.S. §4-431(d)(1) was not applied retroactively to this case. We also decide that the good cause for termination requirement is not an unconstitutional exercise of the police power of the Commonwealth to regulate sales of liquor. Hence, we affirm.

Savatt has been a beer distributor in Allegheny County since 1935. Latrobe is a manufacturer of malt or brewed beverages, principally Rolling Rock beer. In 1939 Latrobe formed Rock Beer

Distributing Company as the primary distributor for Rolling Rock beer in Allegheny County. In 1977, the owner of Rock Beer Distributing divided his Allegheny County. In 1977, the owner of Rock Beer Distributing divided his Allegheny County customers geographically into two groups and sold the rights to service these groups to two different entities, one of which was Savatt. It is not disputed that between 1977 and 1980, Savatt served as Latrobe's exclusive distributor in the territory which it had purchased from Rock Beer Distributing; Latrobe sold beer only to Savatt in the territory, and Latrobe gave instructions to customers in Savatt's territory that those customers must buy only from Savatt.

In 1980 the general assembly amended the Liquor Code by structuring the relationship between brewers and beer distributors:

> All distributing rights as hereinabove required shall be in writing, shall be equitable in their provisions and shall be substantially similar as to terms and conditions with all other distributing rights agreements between the manufacturer giving such agreement and its other importing distributors and distributors shall not be modified, cancelled, terminated or rescinded by the manufacturer without good cause. . . .

47 P.S. §4-431(d)(1). The amendments provided, in addition, that:

> The provisions of this subsection shall not apply to Pennsylvania manufacturers whose principal place of business is located in Pennsylvania unless they name or constitute a distributor or importing distributor as a primary or original supplier of their products subsequent to the effective date of this act, or unless such Pennsylvania manufacturers have named or constituted a distributor or importing distributor as a primary or original supplier of their products prior to the effective date of this act, and which status is continuing when this act becomes effective.

47 P.S. §4-431(d)(5). The amendments gave the courts of common pleas the power to enjoin the modification, recision, cancellation or termination of an agreement between a manufacturer and distributor if the manufacturer's action adversely affects the distributor. 47 P.S. §4-431(d)(4). These amendments were signed into law on June 22, 1980, to become effective in sixty days. They became effective on August 21, 1980. *See* 1 Pa.C.S. §1908, Computation of Time.

In 1980, after passage of the amendments, Latrobe became concerned about its ability to "come up with meaningful territorial descriptions" of each distributor's responsibility in the sixty-day period between passage and the effective date of the amendments. Testimony of James L. Tito, Vice-President, Latrobe Brewing Company, N.T. at 47. Latrobe was concerned that the effect of the act would be to freeze overlapping territories in place; it was not concerned with assuming primary distributorship themselves: "[w]e had no intention of selling direct at any time." *Id.* As an "aborted attempt," N.T. at 44, to deal with the territory problem in the context of the new amendments, Latrobe drew up a form agreement providing that "this writing names and constitutes [name of distributorship] as a secondary importing distributor ... for our Rolling Rock Premium Beer." Latrobe sent this agreement to each of its primary distributors in Pennsylvania. N.T., March 21-22, 1989 at 18-19. The specific agreement between Latrobe and Savatt was executed on August 21, 1980.

Notwithstanding the agreement's language, Latrobe assured Savatt both orally and in writing that the agreement would effect no change in their actual relationship and that their business relationship would proceed as before with Savatt as primary distributor in fact. N.T., March 21-22, 1989 at 25-32, 61-62; letter of August 6, 1980 from James L. Tito, Vice President, Latrobe Brewing Company. Latrobe continued to sell its beer only to Savatt when selling within Savatt's territory, continued to instruct customers located in the territory to buy only from Savatt, and made no direct sales itself within the territory. N.T. at 34, 55-56, 61-62, 81, 108. On October 7, 1987, John Labatt, Inc.

acquired Latrobe from Sundor Group Insurance. Following this, Savatt once more was assured by the new ownership that nothing would change with regard to its distribution relationship with the brewer. N.T., at 81-82. On July 28, 1988, Labatt hand-delivered a letter to Savatt terminating Savatt's right to distribute Rolling Rock beer. N.T., at 84-86.

Savatt commenced this action in equity on August 12, 1988 seeking to enjoin its termination as a distributor of Rolling Rock beer. On February 21, 1989 a special injunction was entered with the parties' consent. Savatt then requested a preliminary injunction which the court denied because Savatt failed to demonstrate that he would incur irreparable harm without it. On July 11, 1989, the Honorable John L. Musmanno conducted a final hearing and on August 2, 1989 issued an Adjudication and Decree Nisi granting Savatt a permanent injunction. On November 3, 1989 the court entered the final decree from which Latrobe now appeals.

Latrobe avers that the chancellor improperly concluded that Savatt had been "named and constituted" as a primary distributor under its 1980 contract with Latrobe. In the alternative, Latrobe contends that, assuming that Savatt was designated a primary distributor, the court improperly applied the good cause for termination requirement retroactively, causing an unconstitutional intererence with the contract. Latrobe further argues that, should we find that Savatt was constituted as a primary distributor and if we should find no retroactive application, the "good cause" requirement is, in itself, an unconstitutional exercise of the Commonwealth's police power.

Our scope of review on an appeal from a final decree upholding the grant of a permanent injunction is limited. We are bound to accept the chancellor's findings of fact and accord them the weight of a jury verdict where supported by competent evidence. We are not, however, bound by conclusions drawn from these facts or by legal conclusions and may reverse for abuse of discretion or error of law. *Den-Tal-Ez, Inc., v. Siemans Capital Corporation*, 389 Pa. Super. 219, 566 A.2d 1214

(1990). Concluding that competent evidence supported the chancellor's findings and that he properly applied the law to these facts, we affirm the order upholding the injunction.

Preliminarily, we decide that the Liquor Code amendments at issue do not unconstitutionally overstep the Commonwealth's police power to regulate the sale of liquor. A strong presumption of constitutionality attaches to acts of the General Assembly, and a heavy burden of persuasion falls on the party seeking to rebut the presumption. *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323 (1986). Most important, control of the sale and use of alcoholic beverages is absolutely within the police powers of the Commonwealth. *Commonwealth, Liquor Control Board v. Starr*, 13 Pa. Commw. 415, 318 A.2d 763 (1974), *affirmed* 462 Pa. 124, 337 A.2d 914 (1975). An individual has no constitutional right to engage in the business of selling alcoholic beverages in the Commonwealth; therefore, the conduct of the liquor business in the Commonwealth is lawful only to the extent and manner permitted by statute. *Replogle v. Commonwealth, Pennsylvania Liquor Control Board*, 514 Pa. 209, 523 A.2d 327 (1987).

The Twenty-first Amendment to the United States Constitution, which repealed the Eighteenth Amendment, also established broad authority in the states to regulate, limit and absolutely prohibit traffic of any kind in alcoholic beverages within their boundaries. *Replogle*, 514 Pa. at 214, 523 A.2d at 330:

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.

*California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342, 349-350 (1972), *rehearing denied* 410 U.S. 948, 93

S.Ct. 1351, 35 L.Ed.2d 615 (1973). In no other area is a state's exercise of its police power more plenary than in the regulation and control of the use and sale of alcoholic beverages. *In re Tahiti Bar, Inc.*, 395 Pa. 355, 150 A.2d 112 (1959), *appeal dismissed by Tahiti Bar, Inc. v. Pennsylvania Liquor Control Board*, 361 U.S. 85, 80 S.Ct. 159, 4 L.Ed.2d 116 (1959).

The purpose of enacting liquor regulation legislation has always been to restrain and to discourage the sale of liquor, not to promote it. *Commonwealth, Pennsylvania Liquor Control Board v. Backer*, 113 Pa. Commw. 373, 537 A.2d 100 (1988). As remedial civil legislation, the Liquor Code is to be liberally construed to effectuate its purpose to protect public health, welfare, peace and morals. 47 P.S. §1-104(a); *Slovak-American Citizens Club of Oakview v. Commonwealth, Pennsylvania Liquor Control Board*, 120 Pa. Commw. 528, 549 A.2d 251 (1988). In other words, the Liquor Code is not, as Latrobe characterizes it, a generic economic regulation of the relationship between contracting parties. Rather, it is an exercise of police power for the protection of the public welfare based upon the constitutional delegation to the states of plenary power to control the sale and use of alcoholic beverages.

The Pennsylvania Supreme Court has articulated two views regarding the proper constitutional analysis for reviewing a claim that a provision of the Liquor Code is unconstitutional. In *Pennsylvania Liquor Control Board v. SPA Athletic Club*, 506 Pa. 364, 485 A.2d 732 (1984), the court reviewed the Liquor Code restrictions under the lowest level of scrutiny under a Fourteenth Amendment analysis, whether there is a rational basis for the regulation at issue. In *Replogle v. Commonwealth, Pennsylvania Liquor Control Board*, our Supreme Court, noting that "[a] classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth[,]" *California v. LaRue*, 409 U.S. at 115, 93 S.Ct. at 395, 34 L.Ed.2d at 350, saw no need for any kind of Fourteenth Amendment analysis and simply found that the regulation at issue was a valid exercise of the Commonwealth's police powers.

Assuming that we must find a rational basis for the good cause for termination requirement, we conclude that such a basis exists. "This deferential standard mandates only that the statutory classification be 'reasonable' and 'rest upon a difference having a fair and substantial relation to the object of the legislation.' " *Estate of Cox*, 327 Pa. Super. 479, 487, 476 A.2d 367, 371 (1984) (citations omitted). The good cause requirement for termination articulated in 47 P.S. §4-431(d)(1), along with the other requirements in that section, is designed to eliminate favoritism by manufacturers toward certain distributors, so as to prevent unfair competition. *Centre Beverage Company, Inc., v. Miller Brewing Company*, 779 F.2d 168 (3d Cir. 1985).

Unlike the overly specific liquor code provision successfully challenged in *United States Brewers' Association, Inc., v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974), a case cited by Latrobe, the provision at issue here is both reasonable and rational. "Good cause" is broadly defined as "the failure by any party to an agreement, without reasonable excuse or justification, to comply substantially with an essential, reasonable and commercially acceptable requirement imposed by the other party under the terms of an agreement." 4-431(d)(1). This requirement is appropriate to address the legislature's desire to prevent termination for the sole purpose of controlling the market, e.g., for price-fixing purposes. We agree with the trial court that, considering the broad and reasonable definition of good cause, it does not impose an undue burden for brewers to fulfill. Given that the general purpose of the Liquor Code is to restrain and discourage the sale of liquor, not to promote it, that the states' police power is plenary in liquor regulation, and that the Code is not a mere general economic regulation, we conclude that Latrobe has not sustained its burden of persuading us that §4-431(d)(1) is unreasonable, unduly oppressive, or unrelated to the legislative purpose. Where a legitimate purpose has been identified and a rational relationship between that purpose and the means chosen to foster it has been established, our inquiry into whether the statute violates the equal protection clause is at an end. *Cox, supra*. We hold that 47 P.S. §4-431(d)(1) is constitutional.

Next, we agree with the chancellor that the August 21, 1990 contract between Latrobe and Savatt "named and constituted" Savatt as primary distributor, despite the language in the written agreement. Adjudication and Decree Nisi, August 2, 1990, Conclusions of Law numbers 10 and 11. We addressed this precise issue in *Matt Lamb & Sons, Inc. v. Christian Schmidt Brewing Company*, 336 Pa. Super. 341, 485 A.2d 836 (1984). In *Matt Lamb*, Schmidt, a Pennsylvania brewer, in anticipation of the new amendments, executed an agreement with Lamb, the distributor, on August 27, 1980 "designating Lamb as a 'secondary importing distributor' of Schmidt's products, and designating itself as primary or original supplier of Schmidt's products." *Matt Lamb*, 336 Pa. Super. at 347, 485 A.2d at 839. The chancellor found that Lamb executed the agreement with the belief that it would not change its business relationship with Schmidt. As in the present case, the parties had had a relationship in which Lamb had been a primary distributor, and, after the new agreement, which had been formulated in response to the new amendments, the relationship did not change substantively. After the agreement, Lamb continued to purchase Schmidt's products directly from Schmidt, and to the knowledge of Lamb's president, Schmidt did not sell directly to any other purchasers in Lamb's territory.

Subsequently, Schmidt sought to terminate Lamb as distributor. Relying upon the principle that the performance of the parties under an agreement is the strongest indication of what a writing means, *Atlantic Richfield Co. v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978), we affirmed the chancellor's finding that the letter agreement had no effect on the status of Lamb as primary distributor:

> We would accept [Schmidt's] argument and grant them the literal meaning of their August 11, 1980 letter, if the letter did accomplish what it claimed. However, even Schmidt agrees that the relationship between the parties was substantially the same prior to and after the letter, which Lamb signed in acceptance.

> Lamb, in fact, testified that he accepted the purported new arrangement only because of assurances that it would not change things.

*Matt Lamb*, 336 Pa. Super at 350, 485 A.2d at 836. We held that because Lamb continued to purchase products directly from Schmidt with virtually no change in the parties' relationship, despite the designation of Lamb as a "secondary importing distributor," Lamb continued to be "named and constituted" a primary distributor by Schmidt, thus triggering the "good cause" requirement for termination. The same fact pattern pertains in our case. Latrobe's officers testified that the relationship between the parties was the same prior to and after the agreement and that Labrobe assured Savatt that this relationship would remain the same. Savatt entered into the agreement only because of these assurances, which he specifically sought. The chancellor's conclusion that Savatt was never "named and constituted" a secondary distributor is based upon competent evidence.

Having decided that the agreement at issue, which was executed on the day that the amendments became effective and which was drafted in response to the amendments, constituted Savatt as a primary distributor, we reject Latrobe's argument that the "good cause" for termination requirement has been applied retroactively where retroactive application would work a due process violation and that was not expressly intended by the general assembly. Prior to the effective date of the amendments, a brewer could terminate a distributor without notice and without cause shown. The amendments imposed upon out-of-state brewers the good cause for termination of distributor requirement but exempted in-state brewers unless the brewer constituted the distributor as primary, or unless the Pennsylvania brewer had constituted the distributor as primary before the effective date of the amendments, and this status continued when the amendments become effective.

In *Rudolph Rosa, Inc. v. Latrobe Brewing Company*, 347 Pa. Super. 551, 500 A.2d 1194 (1985) Latrobe had constitued Rosa

as a secondary distributor pursuant to the amendments. That Rosa was a secondary distributor was not at issue. Pursuant to 4-431(d)(5), then, Latrobe was exempted from the good cause requirement with regard to terminating Rosa, which Latrobe then did without cause. Rosa argued that 47 P.S. §4-492(19) (effective August 22, 1980), which makes it *unlawful* for a manufacturer to terminate a distributor without good cause, overrides the 4-431(d)(5) exemption. The narrow issue before us was whether the legislature intended §4-492(19) to reinstate the "for cause" requirement to situations that it had specifically exempted from this requirement in §4-431(d)(5). *Rosa*, 347 Pa. Super. at 561, 500 A.2d at 1199. We held that this interpretation of the purpose of §4-492(19) would effect an impermissible retroactive application of the good cause requirement upon the "secondary distributor" contract formed pursuant to 4-431(d)(5), absent express legislative itnent, which we found lacking.

*Rosa* does not and could not stand for the general proposition that *any* retroactive application of the Liquor Code amendments is constitutionally prohibited. First, the legislature, in §4-431(d)(5), provided a specific retroactive application of the good cause requirement: if a distributor had been primary before the amendments, and this relationship continued beyond the effective date of the amendments, then the good cause requirement applies to the contract, even though it was formed years before the amendments were contemplated. As we pointed out in *Rosa*, in postponing the effective date of the amendments for sixty days, the legislature gave brewers notice and opportunity to bring their distributor contracts in line with the statute. *Rosa*, 347 Pa. Super. at 563, 500 A.2d at 1200. During the sixty days, brewers could either re-classify a distributor from primary to secondary, which would manifest an intent to take advantage of the exemption, or they could continue their relationship with the primary distributor as primary distributor, thus manifesting an intent to assume the burden of the good cause requirement.

In any event, retroactive application in general is not *per se* prohibited. It is prohibited only if it offends due process, and it offends due process only if, balancing the interests of both

parties, the application would be unreasonable. *Krenzelak v. Krenzelak*, 503 Pa. 373, 469 A.2d 987 (1983). The retroactive application is unreasonable only if it impairs a vested right. *Id.* If, as is true in the field of liquor regulation, there is no constitutional right to engage in the liquor business, the conduct of which is lawful only to the extent permitted by statute, the concept of retroactivity that takes away a right has no application. As we quoted above, "[a] classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth[;]" *California v. LaRue*, 409 U.S. at 115, 93 S.Ct. at 395, 34 L.Ed.2d at 350.

The evidence amply supported the finding that Latrobe intended that Savatt remain a primary distributor pursuant to the new contract initiated with Savatt. Latrobe may not have it both ways by having Savatt believe that the contract continued his status as a primary distributor while at the same time allowing Latrobe to terminate Savatt because of what amounts, after considering the expressed understanding between the parties and the course of dealing, to an empty technicality. Although Latrobe alleges that the distributorship contract in *Rosa* is from the same batch of letter agreements drafted by Latrobe for its distributors as was signed by Savatt in this case, this allegation, even if true, would not mandate the same result, as Latrobe suggests. Rosa's status as primary or secondary distributor was not at issue, and, without discussing the facts underlying the new contract, we assumed that Latrobe intended to designate and succeeded in designating Rosa as a secondary distributor. *Rosa*, 347 Pa. Super. at 557, 500 A.2d at 1197. Nothing in *Rosa* conflicts with our decision today that Savatt was actually constituted as primary distributor and that the amendments have not been applied retroactively.

For all the foregoing reasons, we affirm the order of the trial court issued pursuant to 47 P.S. §4-431(d)(4) enjoining Latrobe from terminating its relationship with Tony Savatt Distributors.

Order affirmed.

## APPENDIX C

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

| | |
|---|---|
| TONY SAVATT, INC. | CIVIL DIVISION |
| Plaintiff, | No.: GD 88-13932 |
| vs. | ADJUDICATION & DECREE NISI |
| LATROBE BREWING CO., LABATT IMPORTERS, INC., LABATT U.S.A. INC., and John P. O'Connell | |
| Defendant. | MUSMANNO, J. |

Copies to:

Robert J. Cindrich, Esq.

Peter Hearn, Esq.

Wm. Alvah Stewart, III, Esq.

## ADJUDICATION

### *I. Factual Summary*

MUSMANNO, J., August 2, 1989. This equity suit arises from the termination of an agreement between the Plaintiff and the Defendants for the distribution of Rolling Rock Beer in portions of Allegheny County.

Plaintiff, Tony Savatt, Inc., is a Pennsylvania corporation, which has been engaged in the business of distributing beer in Allegheny County since 1935. The Defendant, Latrobe Brewing Company, was and is a manufacturer of malt or brewed beverages, including principally, Rolling Rock Beer. In 1939, Rock Beer Distributing Company was formed as part of the Latrobe operation, and functioned as the primary distributor for Rolling Rock Beer in Allegheny County.

Sometime in 1977, the owner of Rock Beer Distributing Company divided his customers in Allegheny County into two groups on a geographic basis, and sold the rights to service these customers to two different concerns, one of which was the Plaintiff. Between 1977 and 1985, Plaintiff served as Latrobe's exclusive distributor in the territory which it had purchased from Rock Beer Distributing Company.

In 1980, Latrobe become aware of the pending amendments to the provisions of 47 P.S. §4-431(d)(1), and under the belief that its then current distribution arrangement might be in violation of this pending change, prepared a new agreement for every former primary distributor in Pennsylvania which named said former primary distributors as "secondary distributors."

The parties hereto conducted business pursuant to this agreement through 1987. In 1987 the Defendant, John Labatt Inc., acquired Latrobe Brewing Company. Even after this acquisition, the parties continued the same relationship until, by letter dated July 28, 1988, Defendant, John Labatt, Inc., terminated Plaintiff's right to distribute Rolling Rock Beer. This suit in equity followed.

## *II. Statement of Issues*

The key issue in the instant case is: Did Latrobe have the right to terminate Savatt's distribution agreement without "good cause" as defined in the Liquor Code? The resolution of this issue depends on whether or not Savatt was, in fact, a "primary distributor."

## *III. Findings of Fact*

To determine the above issues, the Chancellor makes the following findings of fact:

1. Plaintiff is Tony Savatt, Inc., a Pennsylvania corporation, ("Tony Savatt") with its principal place of business at 19-29 Shingiss Street, McKees Rocks, Allegheny County, Pennsylvania. (Tr. 49*, Plf's Ex. 4)

2. Since July 3, 1935, Tony Savatt has been in the beer distribution business servicing customers throughout the Allegheny County area. (Tr. 49)

3. Defendant, Latrobe Brewing Co., is a Pennsylvania corporation, with a registered address of 119 Jefferson Street, Latrobe, Pennsylvania. (Complaint and Answer, Paragraph 2)

4. Latrobe is, and at all times herein relevant was, a manufacturer of malt and brewed beverages, principally a beer known as Rolling Rock beer. (Complaint and Answer, Paragraph 6; Tr. 5)

5. Defendant, Labatt Importers, Inc., is a New York corporation with its principal place of business in Darien, Connecticut. (Complaint and Answer, Paragraph 3)

* (Unless otherwise noted, all transcript references are to the transcript of the Preliminary injunction hearing of March 21-22, 1989.)

6. Defendant, Labatt's U.S.A. Inc., is a Delaware corporation with its principal place of business in Darien, Connecticut. (Complaint and Answer, Paragraph 4)

7. Defendant, John P. O'Connell, is the Vice President - Sales of Latrobe and Labatt's U.S.A. (Complaint and Answer, Paragraph 5)

8. In 1939, Rock Beer Distributing Company, herein Rock Distributing, was started as part of the Latrobe operation and was acquired by one Pete Splendor. (Tr. 7)

9. Rock Distributing was appointed a primary distributor[1] for Rolling Rock beer in Allegheny County sometime prior to 1977. (Tr. 8)

10. With the knowledge, permission and consent of Latrobe, and its executive vice-president, James L. Tito, Splendor, in 1977, divided his customers into two groups (Tr. 12) by their geographical location in Allegheny County. Generally, those customers of Rock Distributing located North, Northwest and Northeast of Pittsburgh and a portion of downtown Pittsburgh, were sold to Savatt and those customers located South, Southwest and Southeast of Pittsburgh, plus the rest of Pittsburgh, were sold to A.P. Weilersbacher. The division resulted in Weilerbacher having 55% of the former Rock Distributing territory, while Savatt had 45%. (Tr. 163)

11. At the time of the Rock Distributing division, all parties understood that Tony Savatt would therefore be a primary supplier for Latrobe Brewing Company. (Tr. 11-14; 51)

12. In 1977, following the sale of a portion of Rock Distributing to Savatt, Latrobe named and constituted Tony Savatt Inc. "*as an original or primary supplier* for the beverage

---

[1] As a primary distributor, Latrobe would sell beer to Rock Distributing who would resell to distributors within a specific geographic area. The territory was exclusive. (Tr. 9-10)

products of the Latrobe Brewing Company. . ." Attached was a list of distributors that Savatt would sell to exclusively. (Tr. 12-13, 51, 69)

13. Between 1977 and November 1985, Latrobe Brewing sold beer only to Tony Savatt, Inc. in the territory designated. (Tr. 33, 55) In fact, Latrobe gave instructions to customers in Savatt's territory that those customers must buy only from Savatt. (Tr. 34, 56)

14. From 1977 through 1985, no direct sales were made by Latrobe Brewing company into the territory serviced by Tony Savatt, Inc. (Tr. 33, 56)

15. In 1980, Latrobe became aware of certain changes in the Pennsylvania Liquor Laws. (Tr. 19) Latrobe believed that these changes in the law necessitated that its contractual arrangements with its primary distributors had to be further defined or the Liquor Control Board might otherwise find Latrobe in violation of the law. (Tr. 26, 40, 41, 42)

16. Sometime in August of 1980, Latrobe sent to Savatt a new agreement which has been identified as Plaintiff's Exhibit 3. The document, Plaintiff's Exhibit 3, was signed by Latrobe on August 14, 1980; it was signed by Savatt on August 21, 1980.

17. In August of 1980, Latrobe prepared this new agreement for every former primary distributor in Pennsylvania, ostensibly naming them as secondary distributors. (Tr. 19, 10, 21)

18. At the same time, Latrobe assured its distributors, including Savatt, that despite their designation as "secondary importing distributor or distributor," there were to be no changes in the parties' relationship, that Latrobe was merely "buying time" to comply with the new law, and that Latrobe had no intention of "selling direct" at any time. (Tr. 23, 24, 26, 31)

19. Despite Savatt and others being designated as "secondary importing distributor or distributor" in August of 1980, the

business relationship between Savatt and Latrobe and its successors remained substantially the same as it was prior to August of 1980. (Tr. 33, 34, 42, 43, 56)

20. In August of 1980, Pete Splendor, former owner of Rock distributing and now a consultant to Plaintiff, made specific inquiry as to the continuing business relationship between Plaintiff and Latrobe and received assurances that the relationship would remain the same. (Tr. 62)

21. In 1980, Latrobe had designated itself as the primary distributor of Rolling Rock beer for the entire Commonwealth of Pennsylvania. Latrobe made this designation since it was aware that the new so-called "secondary importing distributors or distributors" would be allowed to continue to service their customers. (Tito, dep 26)

22. Since 1980, Latrobe designated in writing certain beer distributorships as primary distributors for specific geographic areas. Latrobe made these designations despite the fact that it had ostensibly designated itself as the primary distributor for all of the Commonwealth of Pennsylvania. (Tito, dep 27)

23. In 1985, Sundor Group Insurance acquired Latrobe. (Tr. 180, 81)

24. The relationship between Latrobe/Sundor and Tony Savatt remained the same as it had in the past. (Tr. 55, 56, 81)

25. Between 1980 and 1988, Latrobe Brewing sold beer only to Tony Savatt, Inc. in the territory designated. In fact, Latrobe gave instructions to customers in Savatt's territory that those customers must buy only from Savatt. (Tr. 34, 55, 56, 81)

26. From 1980 through 1988, no direct sales were made by Latrobe Brewing Company into the territory serviced by Tony Savatt, Inc. (Tr. 34, 55, 56, 81)

27. On October 7, 1987, John Labatt, Inc. acquired the stock of Latrobe from Sundor Group Insurance.

28. On October 8, 1987, Mark Voit, Sales Representative of Labatt's, wrote a letter to all distributors stating "Due to this acquisition, I have met with my new immediate supervisor. He has requested information from me, to not only be familiar with my area, but also to discuss its' needs. We will be going over each of your areas discussing pricing, problems and opportunities. *"He has stated that you should not be concerned about losing the brand as had happened a few years ago, but instead, reap the benefits from Labatt's resources."* (Plaintiff's Exhibit 16, emphasis supplied)

29. From its inception, the plan of the Labatt Companies has been to consolidate its wholesalers of both Labatt's and Latrobe products into one distributor. The purpose of this consolidation is in part to allow Labatt's to have greater control over the prices charged by distributors to consumers and other distribution activities of the wholesalers. (Testimony of Voit, Williams and O'Connell)

30. Following Labatt's purchase of Latrobe, John O'Connell, Mark Voit and Dick Williams, Regional Marketing Representative of Labatt's all conveyed the message to Tony Savatt that nothing would change with regard to its distribution relationship with Latrobe. (Tr. 82)

31. On or about July 18, 1988, Rich Booker had a conversation with Mark Voit, complaining about the sales of Latrobe Beer by another distributor into the geographic territory which Tony Savatt serviced. (Tr. 84)

32. Mr. Voit scheduled an August 1, 1988 meeting, ostensibly to discuss this problem as well as others. (Tr. 84) (*See also*, Williams deposition at 64, 65)

33. Rather than having the meeting on August 1, 1988, Defendant hand delivered the termination letter dated July 28, 1988 to Tony Savatt. (Plaintiffs Ex. 5, Tr. 84, 85)

34. After the August 21, 1980 agreement, Savatt added 5,000 square feet of warehouse space at a cost of Seventy Thousand Dollars ($70,000). (Tr. 52) The purpose of the addition was to provide more warehouse space specifically for Rolling Rock Beer. This addition occurred with the knowledge of James L. Tito who, "thought it was a good idea." (Tr., 38) By virtue of its commitment of space to Rolling Rock Beer, an additional 2500 square feet of warehouse space was added in 1986 at a cost of Fifty-six Thousand Dollars ($56,000). (Tr. 54)

35. Following the August 1980 agreement, Savatt added a full-time salesman exclusively for the sale of Rolling Rock Beer. (Tr. 53)

36. Savatt also purchased a closed van truck at a cost of Twelve Thousand Dollars ($12,000) which truck was used exclusively for the distribution and advertisement of Rolling Rock Beer.

37. From 1980 until 1988, Savatt undertook eight (8) years of promotional activities such as radio and newspaper advertising, other advertising, and other promotional expenditures, exclusively related to the sale of Rolling Rock Beer. (Tr. 53)

38. Tony Savatt would "definitely not" have made the above expenditures had it not believed that its status was unchanged and would remain so as promised. (Tr. 57, 62)

39. During 1985 through 1988, Tony Savatt made approximately $1.78 per case on each case of Rolling Rock.

40. Tony Savatt made a profit of One Hundred Seventy-eight Thousand Dollars ($178,000) on the sales of Rolling Rock in 1988.

41. Tony Savatt had an overall pre-tax profit in 1988 of Ninety Thousand Dollars ($90,000).

42. For each year from 1985 through 1989, 90 percent of Savatt's Rolling Rock sales were to "D" Distributors.

43. Currently, Tony Savatt can purchase Rolling Rock only from Earl Brandt Distributing. Brandt charges the same price to Tony Savatt as to "D" Distributors formerly serviced by Tony Savatt.

44. As a result of its inability to buy directly from Latrobe, Tony Savatt no longer has sales of Rolling Rock to its "D" Distributors who can purchase directly from Brandt.

45. By virtue of the loss of "D" Distributor customers, Tony Savatt will incur a net loss for its entire business operation in fiscal year 1989-1990 of $70,000.

46. In addition to the direct loss of Rolling Rock sales, Tony Savatt is losing sales on its "satellite brands" since "D" Distributors no longer buy these brands which they previously purchased when also buying Rolling Rock products. This loss of sales will further increase the future losses of Tony Savatt.

47. Since the termination, Tony Savatt has made efforts to locate other beer distribution rights to replace the Rolling Rock brand but has not been successful in finding such a replacement.

*IV. Discussion*

In August of 1980, certain amendments to the Liquor Code, became effective. Among these were amendments to §4-43(d)(1). This provision provides, in pertinent part:

> "All distributing rights as herein above required shall be in writing, shall be equitable in their provisions and shall be substantially similar as to terms and conditions with all other distributing rights agreements between the manufacturer giving such agreement and its other importing distributors and distributors shall

> not be modified, cancelled, terminated or rescinded by the manufacturer without good cause. . ."

The provisions of that same section define "good cause" as:

> . . ."the failure by any party to an agreement, without reasonable excuse or justification, to comply substantially with an essential, reasonable and commercially acceptable requirement imposed by the other party under the terms of an agreement." 47 P.S. §4-431(d)(1).

The Legislature went on to indicate the applicability of the provisions of §4-431(d) to specific manufacturers of brewed beverages in 47 P.S. §4-431(d)(5) which states:

> "The provisions of this subsection shall not apply to Pennsylvania manufacturers whose principal place of business is located in Pennsylvania unless they name or constitute a distributor or importing distributor as a primary or original supplier of their products subsequent to the effective date of this act, or unless such Pennsylvania manufacturers have named or constituted a distributor or importing distributor as a primary or original supplier of their products prior to the effective date of this act, and which status is continuing when this act becomes effective."

Savatt's basic contention is, therefore, that it was a primary supplier of Latrobe Brewing Company products prior to the August 1980 amendment of the Liquor Code. Savatt also contends that despite the modification of this primary distributor status by the August 1980 agreement, its business relationship with Latrobe Brewing Company continued as that of a primary distributor until 1988 when it was terminated. Savatt thus contends that it can be terminated only upon a showing of "good cause", as defined in 47 P.S. §4-432(d)(1).

The position of the Defendants, however, is that their designation of Savatt as a "secondary distributor" prior to the effective date of §4-431(d) (1) eliminates the requirement of "good cause" for termination, and that they could terminate Savatt as a distributor without cause, and for any reason. Further, they contend that the "good cause" requirement itself is an unconstitutional exercise of the Commonwealth's police power as set forth in §4-431(d) (1) and §4-492(19).

In addition to the provisions of §4-431(d), the Legislature enacted 47 P.S. §4-492(19). This section was the method of enforcement for the proscription contained in §4-431(d). §492(19) makes it unlawful:

> "For any manufacturer or any officer, agent or representative of any manufacturer to modify, cancel, terminate, rescind or not renew, without good cause, any distributing rights agreement, and in no event shall any modification, cancelation, termination, rescission, or non-renewal of any distributing rights agreement become effecive for at least ninety (90) days after written notice of such modification, cancelation, termination, rescission or intention not to renew has been served on the effective party and board by certified mail, return receipt requested except by written consent of the parties to the agreement. The notice shall state all the reasons for the intended modification, termination, cancelation, rescission or non-renewal. The distributor or importing distributor holding such agreement shall have ninety (90) days in which to rectify any claimed deficiency, or challenge the alleged cause."

In *Rudolph Rosa, Inc. v. Latrobe Brewing Company* ____ Pa. Super. ____, 500 A.2d 1194 (1985), the Superior Court of Pennsylvania held that the provisions of §4-431(d) and §4-492(19) are not retroactive and have prospective application only.

Thus, in order to show entitlement to the requested relief, Savatt must show that its status as a "primary distributor"

existed subsequent to the effective date of the amendments to the Liquor Code. In the instant case, the testimony reveals that after the designation of Savatt as a "secondary distributor," none of the Defendants ever acted as a "primary distributor." Indeed, testimony reveals that none of the Defendants ever intended to act as a "primary distributor." The Defendants, in fact, affirmatively prohibited other beer distributors from purchasing Rolling Rock Beer from any other distributor other than Savatt, thus implicitly acknowledging Savatt as a "primary distributor."

This state of facts is considerably different from that in *Rosa, supra*, in which the Defendant did, in fact, sell beer as a "primary distributor."

Having concluded that the protections of the statute do not extend retroactively to Savatt, the Court must next consider whether or not Savatt was ever a "primary distributor" subsequent to the effective date of the statute. A resolution of this issue requires a review and analysis of the nature of the business relationship between Plaintiff and Defendants, and the course of dealing of the parties subsequent to the August 1980 letter.

Initially, Savatt adduced testimony as to the nature of the business relationship both prior to and subsequent to the August 1980 letter. Testimony from officers of Savatt, as well as from the former executive vice-president of Defendant, Latrobe, indicated there was no change in the business relationship of the parties from 1977 when Savatt first acquired the rights as a primary distributor from Rock Distributing, until 1988 when it was terminated. Indeed, the Court notes the testimony of James L. Tito, retired executive vice-president of Latrobe, which clearly establishes that Savatt functioned as a "primary distributor" both before and after the August 1980 letter. Repeated verbal assurances were given to officers of Savatt that Savatt's status would not change.

The Supreme Court of Pennsylvania, in *Atlantic Richfield Company v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978) held that performance of the parties to an agreement is a relevant

indication of what the agreement means. Further, in a fact situation similar to that of the instant case, the Superior Court of Pennsylvania, in *Matt Lamb and Sons, Inc. v. Christian Schmidt Brewing Company*, 336 Pa. Super. 341, 485 A.2d 836 (1984) held that the course of dealing of the parties to a distributing rights agreement was crucial to a determination of what the agreement meant. This is in accord with both the provisions of the Pennsylvania Commercial Code (13 Pa.C.S.A. §2208(a)-(c), and the Restatement (2d) of Contracts, §228(4).

It is also clear, that even though a contract or agreement is in writing, a subsequent oral modification is possible. *See, Betterman v. American Stores Company*, 367 Pa. 193, 80 A.2d 66, *cert. den.* 72 S.Ct. 49, 342 U.S. 827, 96 L.Ed. 625 (1958). This Court finds compelling the testimony regarding the repeated oral assurances provided by Latrobe to Savatt that their distributing relationship would remain unchanged. This Court concludes that these oral representations constitute a subsequent parol modification of the August 1980 agreement. *See generally, Douglas v. Benson*, 294 Pa.Super. 119, 439 A.2d 779 (1982).

Based both upon the course of dealing and the subsequent parol modification of the August 1980 agreement, this Court finds that despite the August 1980 agreement, Savatt continued to be "named and *constituted*" a "primary distributor" subsequent to the effective date of the provisions of §4-431(d) of the Liquor Code. By this analysis, the retroactivity bar set forth in *Rosa, supra*, becomes logically consistent, and harmonious with the reasoning set forth in *Matt Lamb and Sons, Inc., supra.*

Defendants also contend that the "good cause" requirements of the Liquor Code are an unconstitutional exercise of the Commonwealth's police power. Initially, the Court notes that Defendants bear the burden of demonstrating that the 1980 amendments to the Liquor Code "clearly, palpably, and plainly" violate the Constitution. *Estate of Cox.* ____ Pa.Super. ____, 476 A.2d 367 (1984). Further, any doubts as to the constitutionality of a statute are to be resolved in its favor. *Hayes v. Erie Ins. Exchange*, 493 Pa. 150, 425 A.2d 419 (1981).

Defendants cite several cases in support of their claim that the 1980 amendments impermissibly impair their agreements. *Pennslyvania State Board of Pharmacy v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971) involved an unreasonable attempt to prohibit advertising of prices of prescription drugs. In *Gambone v. Commonwealth*, 375 Pa. 547, 101 A.2d 634 (1954), there was an attempt to regulate the size of signs advertising the price of gasoline at service stations. Similarly, in *Commonwealth ex rel. Woodside v. Sun Ray Drug Company*, 383 Pa. 1, 116 A.2d 833 (1955), there was an attempt to prohibit sales of a milkshake base which was conceded to be healthy and nutritious.

In these cases, the exercise of the police power by the Commonwealth was not deemed to be related to the public good, and was declared unconstitutional. The other case cited by Defendants, *Fantastic Plastic, Inc. v. Pittsburgh*, 32 Pa.Cmwlth. 41, 377 A.2d 1051 (1977), did not involve the exercise of the Commonwealth's police power, but rather a municipality's attempt to prohibit "bottle clubs." As stated in *Fantastic Plastic, supra*,:

> "Our consideration of the police power question begins with an examination of the Twenty-first Amendment to the Federal Constitution. U.S. Const. Amend. XXI. Where liquor is involved, this amendment has conferred on the states something more than the normal state authority over public health, welfare and morals. *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, (1972)." *Id.* at 1053.

The Liquor Code itself, by its own terms is "...an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people..." 47 P.S. §1-104(a).

Based upon the foregoing, we conclude that Defendants have not met their burden of proof that the provisions of §4-431(d)(1)-(5) and §4-492(19) are an impermissible exercise of the police power, and we find these provisions to be proper regulations of the distribution of alcoholic beverages.

Having thus concluded, the Court must turn its attention to the relief requested by the Plaintiff. The powers of this Court in fashioning a remedy in this situation are set forth in 47 P.S. §4-431(d) (4), which states in pertinent part:

> "The court of common pleas of the county wherein the licensed premises of the importing distributor or distributor are located is hereby vested with jurisdiction and power to enjoin the modification, rescission, cancellation or termination of a franchise or agreement between a manufacturer and an importing distributor or distributor at the instance of such importing distributor or distributor that *who is or might be adversely affected by such modification, rescission, cancellation or termination . . .*" (emphasis supplied)

Savatt contends, in the alternative, that Defendants should be equitably estopped from denying its status as a "primary distributor." They point to the testimony regarding expenditures made by Savatt in justifiable reliance on the inducement or representations of the Defendants that the business relationship would remain unchanged. Specifically, Savatt expanded its warehouse facilities not once, but twice, at a combined cost of One Hundred Twenty-six Thousand Dollars ($126,000.00). Representatives of Savatt further testified that they purchased a truck used exclusively for the delivery and advertising of Rolling Rock Beer for Twelve Thousand Dollars ($12,000.00). The record also contains testimony that Savatt forbore purchasing several other beer distributors which were available for purchase in order to concentrate on the distribution of Rolling Rock Beer. The record also contains testimony regarding severe financial reverses and lost profits which will be suffered by Savatt should Defendant's termination be permitted to stand.

These same arguments which form the basis of Plaintiff's claim of equitable estoppel also indicate the "adverse affect" which Savatt has suffered as a result of the termination. Thus, this Court is empowered to enjoin this termination pursuant to the provisions of the Liquor Code. 47 P.S. §4-431(d) (4).

The Court notes, however, that by its conclusion, it is not precluding a termination in compliance with the terms and conditions of §4-431(d) and §4-492(19) of the Liquor Code. Although there was testimony in the instant case from Defendants of Savatt's declining sales, it was agreed and stipulated that the defense in this matter was not based upon a showing of "good cause." Obviously, the Legislature did not intend for Defendants to be bound to one distributor *ad infinitum*, or it would not have provided the provisions for termination that it did, i.e., termination only for "good cause."

To recapitulate, although the status of Savatt under the August 1980 agreement was that of "secondary distributor", the subsequent parol modification and course of dealing between the parties shows that there was no real change in the relationship, and that Savatt continued to be "named and constituted" a "primary distributor." Such status as a "primary distributor" triggers the "good cause" requirements for terminations contained in the Liquor Code, which were not followed in the instant case. The expenditures, and forbearance of Savatt in reliance on the assurances of Latrobe which were advanced in support of its estoppel argument also constitute "adverse affects" on Savatt. When this is coupled with the severity of lost profits Savatt will face, it is apparent that the court is empowered to enjoin this termination.

Based upon the foregoing analysis, the Court makes the following conclusions of law.

*V. Conclusions of Law*

1. Prior to 1977, Latrobe appointed Rock Distributing as a primary distributor of its products.

2. From 1977 to 1980, Latrobe appointed Tony Savatt as a primary distributor of its products.

3. Sections 431(d) (1) and 492(19), which contain the good cause requirements, were adopted in 1980 as part of amendments to the Pennsylvania Liquor Code.

4. The Governor signed the amendments which comprise section 431(d) (1) on June 22, 1980 to take effect in 60 days. 1980, June 22, P.L.253, No. 73, §1. The amendment which comprises section 492 (19) was signed one day later on June 23, 1980.

5. Latrobe, a Pennsylvania corporation with its principal place of business in Latrobe, Pennsylvania, qualifies as a Pennsylvania manufacturer. 47 P.S. §1-102 (definition of "manufacturer").

6. The Pennsylvania manufacturer exemption, though expressly appearing only in section 431(d), also applies to section 492(19). *Rudolph Rosa, Inc. v. Latrobe Brewing Co.*, 347 Pa.Super. at 551, 500 A.2d at 1194 (1985).

7. Latrobe is exempt from the good cause requirements of 431(d) (1) and 492(19) unless Latrobe "named or constituted" Savatt as "primary or original supplier" subsequent to the amendments' effective date. 47 P.S. §4-431(d) (5)

8. In 1980, Latrobe began a process to bring its contractual arrangements with its distributors into compliance with the amendments to the Liquor Code. Latrobe was concerned with making certain that the Liquor Control Board did not take action against it. Latrobe, however, did not intend the new written agreements to alter its existing distribution relationships with its distributors, including plaintiff.

9. At numerous times, Latrobe through its Executive Vice President gave assurances to its distributors, including plaintiff, that although written contractual changes were being made, no changes were being made in Latrobe's actual relationship with the distributors.

10. On August 21, 1980, Latrobe and Tony Savatt entered into the written agreement which is reflected as Plaintiff's Exhibit 3, and which made Tony Savatt a "secondary distributor."

11. Despite the written agreement of August 21, 1980, Latrobe continued to treat Tony Savatt, Inc. as a primary supplier.

12. Latrobe, through its Executive Vice President, gave specific assurances to representatives of Tony Savatt, Inc., that it would remain a primary distributor of Latrobe.

13. In direct reliance upon the oral assurances and actions of Latrobe, Tony Savatt made significant expenditures of time, effort and money in order to promote Latrobe's products. Tony Savatt made these changes only upon the assurance by Latrobe that Tony Savatt was a primary distributor for Latrobe's products.

14. In 1985, after Sundor acquired the stock of Latrobe, Latrobe continued to treat Tony Savatt as a primary supplier.

15. After John Labatt, Inc. acquired Latrobe's stock from Sundor, both it and Labatt's U.S.A., Inc. continued to assure Latrobe's distributors, including Tony Savatt, that no changes would take place in the existing relationship between Latrobe and its distributors.

16. Plaintiff has proven by a preponderance of evidence that the course of dealing between Tony Savatt and Latrobe was that of a "primary distributor." *Atlantic Richfield Co. v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978).

17. Plaintiff has proven by a preponderance of evidence that Latrobe knowingly made certain oral representations to Tony Savatt expecting Tony Savatt to remain a primary supplier of Latrobe products. Tony Savatt did remain a primary supplier of Latrobe products and made a number of expenditures in order to facilitate the sale of Latrobe products.

18. Plaintiff was "constituted" a primary supplier of Latrobe products both by a course of dealing and subsequent parol modification of the August 1980 agreement.

19. When Latrobe handed Tony Savatt the purported termination letter of August 1, 1988, Latrobe did not have "good cause" to terminate Tony Savatt. Further, Defendants stipulated that

they were not claiming that the termination was based on "good cause."

20. The "good cause" for termination requirement contained in §4-431(d) (1) and §4-492(19) is not an unconstitutional exercise of the Commonwealth's police power.

21. The purported August 1, 1988 termination of plaintiff's status as a supplier of Latrobe products is illegal.

22. In light of our findings of fact nos. 32-47, we conclude that Savatt has been adversely affected by the actions of the Defendants, that such harm will continue into the future, and that Savatt has no adequate remedy at law to redress the improper termination of its distribution rights by Defendants.

23. This Court is empowered to enjoin the activities of defendants. 47 P.S. §4-431(d) (4).

24. A permanent injunction is issued against defendants enjoining defendants from terminating the distribution agreement with plaintiff for Latrobe products without "good cause."

25. Plaintiff shall continue to service the accounts of defendants in good faith.

*VI. Conclusion*

The Court finds that Savatt's termination by Defendants was invalid as it was not in compliance with the provisions of the Liquor Code. Accordingly, this Court grants Savatt's request for injunctive relief, prohibiting all Defendants from this termination of Savatt's right as a primary distributor of Rolling Rock Beer. An appropriate decree *nisi* will follow.

*DECREE NISI*

AND NOW, to wit, this 2nd day of August, 1989, for the reasons set forth in the Adjudication, it is hereby ORDERED, ADJUDGED and DECREED, that the Defendants, Latrobe Brewing Company, Labatt Importers, Inc., Labatt's U.S.A., Inc. and John P. O'Connell, are hereby enjoined and prohibited from this termination of Plaintiff's right as a primary distributor of Rolling Rock Beer.

It is FURTHER ORDERED that Plaintiff shall continue to service the accounts of the Defendant manufacturer in good faith pursuant to 47 P.S. §4-431(d) (5).

It is FURTHER ORDERED that this Decree shall become final within ten (10) days of the date hereof in accordance with the Pennsylvania Rules of Civil Procedure.

BY THE COURT:

/s/ Musmanno, J.

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| LARCO DISTRIBUTING, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 90-1462-K |
| | ) | |
| LATROBE BREWING COMPANY, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |
| | ) | |

MEMORANDUM AND ORDER

The court has at hand the motion of defendant Latrobe Brewing Company for dismissal of the present action or, in the alternative, to dissolve the temporary restraining order. Larco Distributing, Inc. initially brought a claim for injunctive and other relief against Latrobe in state court, in a dispute arising over Latrobe's

termination of a beer distribution agreement between the parties. Although the state court issued a temporary restraining order on August 31, 1990 prohibiting Latrobe from taking any further action to terminate the distribution agreement, on the day following the order the State of Kansas approved Latrobe's earlier request for termination. Reversing an earlier ruling, the state concluded that Latrobe's request to terminate the agreement was based upon reasonable cause. On September 4, Latrobe removed the action to this court.

The essence of Larco's complaint is that Latrobe's attempt to terminate the distribution agreement is improper because it is without reasonable cause. K.S.A. 41-410 requires that the termination of an agreement for the

distribution of beer may only be predicated on reasonable cause. However, the court finds that dissolution of the restraining order is warranted since it is predicated on the application of a statute in a manner which serves to impair Latrobe's contractual rights in violation of U.S. Const. Art. I, § 10.

The present version of K.S.A. 41-410, which requires reasonable cause for the termination of beer distribution agreements, did not become effective until January 1, 1988. Prior to that time, Kansas law required a reasonable cause for the termination of distribution agreements for other alcoholic liquors and spirits. Beer distribution agreements, however, were explicitly excluded from the statute's reasonable cause requirements.

The distribution agreement between Larco and Latrobe for the distribution of Rolling Rock Beer was entered into on July 30, 1986. This agreement has no set term, and clearly appears to contemplate the ability of either party to terminate the agreement at will. In its brief to this court, Larco makes no attempt to contend that, in the absence of K.S.A. 41-410, the agreement does not provide for at-will termination.

The application of the present version of K.S.A. 41-410, with its limitation on the right of termination, clearly works an impairment of the parties' rights under a prior and valid contract. Without the benefit of this statute, Larco's restraining order has no purpose and must be dissolved.

Larco raises several arguments in opposition to Latrobe's motion. It contends that Latrobe has waived its right to argue the unconstitutionality of the statute by initially seeking the state's permission to terminate the contract on a reasonable basis. But there is no indication that Latrobe, in first attempting to demonstrate reasonable cause, was doing anything other than trying to achieve a termination in the simplest manner. There is no indication that Latrobe was waiving its right to argue the unconstitutionality of an application of K.S.A. 41-410 if the matter became the subject of dispute.

More importantly, there is no evidence of any detriment to Larco. Larco makes no attempt in its argument to assert that its interests were

significantly impaired by Latrobe's actions. Nor does Larco suggest that an earlier assertion of unconstitutionality by Latrobe would have caused it to accede to Latrobe's desire to terminate the agreement. Rather, the history of the case indicates Larco's consistent intent to fight the termination to the full extent of its capabilities. There is no basis for finding a waiver by Latrobe of its right to argue that the application of K.S.A. 41-410 here is constitutionally impermissible.

Larco also suggests that the application of the present version of K.S.A. 41-410 is valid because the liquor industry in Kansas is a heavily regulated industry. In support of this argument, Larco cites a series of wholly irrelevant cases dealing with the general authority of the state to

regulate alcoholic beverages and with the constitutional validity of specific regulations not relevant here. See, e.g., National R.R. Passenger Corp. v. Miller, 358 F.Supp. 1321 (D. Kan. 1973), aff'd, 414 U.S. 948 (1973) (whether application of the state's liquor laws to Amtrak trains traveling through Kansas was invalid as, among other things, an undue burden on interstate commerce); Colby Distributing Co. v. Lennen, 227 Kan. 179, 606 P.2d 102 (1980) (dealing with the question of whether portions of the state liquor laws violate the Sherman Antitrust Act and were therefore invalid under the supremacy clause); Tri-State Hotel v. Londerholm, 195 Kan. 748, 408 P.2d 877 (1965) (whether the state's "private club" arrangements violated equal protection).

None of the cases cited by Larco provide support for the notion that constitutional guarantees fly out the window whenever liquor is mentioned. Instead, these cases all deal with the general ability of the state to restrict or prohibit the sale of liquor pursuant to its police power. They also discuss whether given regulations are consistent with specific constitutional guarantees. The cases do not stand for the proposition that the constitutional prohibition on the impairment of contracts is rendered meaningless because the contract involves the distribution of beer.

The agreement at issue here is a valid contract between two consenting parties. The retrospective application of a subsequent regulation to the agreement, significantly altering the

parties' rights thereunder, is not permissible under the federal constitution. The effect of the new version of K.S.A. 41-410 is not a mere remedial change in the law facing persons involved in the distribution of beer. Rather, it is a significant alteration of the substantive rights, a modification of existing contracts which is not compatible with the Constitution. See H. Phillips Co. v. Brown-Forman Distillers Corp. 483 F.Supp. 1289 (W.D. Wis. 1980); Globe Liquor Co. v. Four Roses Distillers, 281 A.2d 19 (Del.), cert. denied, 404 U.S. 873 (1971); Park Benziger & Co. v. Southern Wine & Spirits, Inc., 391 So.2d 681 (Fla. 1980); Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868 (Minn. 1986), cert. denied, 479 U.S. 1060 (1987); United

States Brewers Ass'n v. State, 220 N.W.2d 544, 548 (Neb. 1974).

Therefore the present version of K.S.A. 41-410 either must be interpreted to apply prospectively only, and not to beer distribution agreements in existence prior to its effective date, Superior Motors, Inc. v. Winnebago Industr. Inc., 359 F.Supp. 773 (D.S.C. 1973), or, without such a saving interpretation, found violative of Art. I, § 10 in its application to prior agreements. In either event, the restraining order in favor of Larco, which is predicated on its claim for wrongful termination in violation of K.S.A. 41-410, is without purpose and will hereby be dissolved.

IT IS ACCORDINGLY ORDERED this 15 day of October, 1990, that the defendant's motion to dissolve the

temporary restraining order (Dkt. No. 6) is hereby granted.

PATRICK F. KELLY, JUDGE

**APPENDIX E**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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|---|---|---|
| LARCO DISTRIBUTING, INC., | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 91-3045 |
| | ) | (D.C.No. 90- |
| | ) | 1462-K |
| LATROBE BREWING COMPANY, | ) | (D.Kan.) |
| | ) | |
| Defendant-Appellee. | ) | |

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**ORDER AND JUDGMENT***

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Before **ANDERSON, TACHA** and **BRORBY**, Circuit Judges.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Larco Distributing, Inc. (Larco) appeals the district court's dismissal of its complaint for failure to state a claim upon which relief could be granted.

Larco, a Kansas wholesale beer distributor, and Latrobe Brewing Company (Latrobe), a Pennsylvania brewer, entered into a written agreement whereby Larco had the exclusive right to distribute Latrobe's beer within a specified area of Kansas.

In 1986, when the parties entered into this beer distribution agreement, Kansas law failed to specify a standard for the termination of a beer distribution agreement. The district court found, and no one disputes, this contract could then be terminated at will.

Thereafter, Kansas twice amended its laws to provide a standard to be followed by a supplier in terminating a franchise beer distribution agreement. These amendments provided that no franchise agreement for the distribution of beer could be terminated "except for reasonable cause."[1]

Larco, after unsuccessfully pursuing administrative relief, commenced this action based upon the

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[1] Kan. Stat. Ann. §41-410 (f) (Supp. 1990).

newly enacted Kansas law. The gravamen of the complaint was that termination of the beer distribution agreement would be improper without "reasonable cause."

Latrobe filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted this motion after concluding that the current version of Kansas law, with its limitation upon the right of termination, clearly worked an impairment of the parties' rights under a valid prior contract. The district court reasoned that Kansas law should be interpreted to apply prospectively only and did not apply to beer distribution agreements in existence prior to its effective date thereby relieving the district court of the burden of declaring the new Kansas law violative

of Art. I, Sec. 10 of the United States Constitution.

Larco first contends that because the Twenty-First Amendment gives to the states the power to regulate the importation of alcoholic beverages, Kansas may regulate liquor, and therefore the Kansas Supreme Court would undoubtedly rule that Kansas could exercise its police power over alcoholic beverages unfettered by the Contracts Clause. We disagree. As aptly stated by the district court when presented with the same argument in this case:

> None of the cases cited by Larco provide support for the notion that constitutional guarantees fly out the window whenever liquor is mentioned.... [T]he constitutional prohibition on the impairment of contracts is [not] rendered meaningless because the

contract involves the distribution of beer.

It has long been basic law that the laws that exist at the time and place of the making of the contract enter into and form a part of it and any impairment of the obligation of a contract is within the prohibition of the Constitution. Walker v. Whitehead, 83 U.S. (16 Wall. ) 314, 317-18 (1872).

Larco also argues the statute in question was intended to have retrospective effect in order to apply to beer distribution agreements. Again, this argument has no merit. Absent clear language to the contrary, a statute should be applied prospectively to avoid constitutional violation. The plain language of the statute in question fails to reveal any legislative intent for this new law to operate

retrospectively. Larco cites legislative history; however, even if we were to hold the legislative history somehow overcomes the statutory language, Larco's recitation of legislative history fails to persuade us this was the legislative intention. It is for the legislature to clearly specify its intent to have the law operate retroactively and this the Kansas legislature has not done. De Vargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1388 (10th Cir. 1990), cert. denied, 111 S. Ct. 799 (1991).

Larco next raises a number of arguments including its contentions that Kansas is merely exercising its police power to protect a basic interest and public policy considerations exist that allow Kansas to avoid a strict

interpretation of the Contracts Clause, and that the Contracts Clause is inapplicable to the liquor industry as it is a highly regulated industry. Such arguments merit little discussion. It is sufficient to note that all authorities cited in support of these arguments are either distinguishable or fail to support their arguments.

The judgment of the district court is **AFFIRMED.**

Entered for the Court:

**WADE BRORBY**
Circuit Judge

**APPENDIX F**

L & M BEVERAGE CO., INC., et al.
v.
ANHEUSER-BUSCH, INC., et al.
Civ. A. No. 85-6937

United States District Court, E.D. Pennsylvania
September 8, 1987.

Laura M. Shemick, Sprague, Thall & Albert, Philadelphia Pa., for plaintiff.

Patrick W. Kittredge, Kittredge, Kaufman & Donley, Philadelphia Pa., for Anheuser-Busch Companies, Inc. Carlsberg International S.A.

Scott E. Flick, Terrence C. Sheehy, Howrey & Simon, Washington, D.C., for Anheuser-Busch, Inc.

Anniken U. Horton, Asst. Counsel, Dept. of Revenue, Office of Chief Counsel, Harrisburg, Pa., Dept. of Revenue (Nonparty Deponent).

MEMORANDUM AND ORDER

HUYETT, District Judge.

Plaintiffs are beer wholesalers who at one time sold Carlsberg International, A's ('Carlsberg')

products. Defendants are Anheuser-Busch, Incorporated ('A-B'), a corporation engaged in the manufacture and distribution of malt and brewed beverages, and Carlsberg, a foreign corporation engaged in the manufacture and sale of malt and brewed beverages. In 1985, defendants entered into an arrangement whereby A-B became the exclusive distributor of Carlsberg products in the United States. On December 9, 1985, defendants terminated plaintiffs' distributorships of Carlsberg products, and plaintiffs have been unable to procure Carlsberg products. Subsequently, plaintiffs brought this action seeking relief under both state and federal law.

Pending are defendants' motion for partial summary judgment on three counts of the amended complaint: (1)

Count VIII which alleges a violation of section 7 of the Clayton Act, 15 U.S.C. s 18, (2) Count IV which alleges that defendants committed the tort of fraudulent misrepresentation under Pennsylvania common law; and (3) Count II, in which plaintiffs seek relief under the Pennsylvania Liquor Code. For the reasons stated below, defendants' motion is granted in part and denied in part.

## I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if there exists no genuine issue of material fact the moving party is entitled to judgment as a matter of law. Small v. Seldows Stationery, 617, F.2d 992, 994 (3d Cir. 1980). The court does not rule on questions of disputed fact, but simply decides whether there is a

genuine issue of material fact which must be resolved at trial. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986). The facts and inferences therefrom must be viewed in the light most favorable to the opposing party, and any reasonable doubt as the existence of a genuine issue of material fact must be resolved against the moving party. Continental Ins. Co. v. Bodie, 682 F.2d 436, 438 (3d Cir. 1982).

## II. CLAYTON ACT CLAIM

In Count VIII of their amended complaint, plaintiffs allege that A-B's distribution agreement with Carlsberg constitutes an acquisition of an asset in violation of section 7 of the Clayton Act, 15 U.S.C. s 18. Defendants move for summary judgment on the grounds that plaintiffs lack standing to assert this

claim because they have not been injured in [their] business or property by reason of anything forbidden in the antitrust laws' as is required to maintain an action for damages under section 4 of the Clayton Act, 15 U.S.C. s 15.

As both plaintiffs (see tr. oral arg. at 26) and defendants agree, the appropriate analysis for standing is set forth in Brunswick Corp. v. Pueblo Bowl-O Mat, Inc., 429 U.S. 477 (1977). In Brunswick, the Court held that to have standing under the Clayton Act, '[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the

violation or of anticompetitive acts made possible by the violation. It should, in short, be 'they type of loss that the claimed violations . . . would be likely to cause." Id. at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)).

Plaintiffs argue that they have alleged an antitrust injury due to their decreased market share because A-B terminated their distributorships and is now distributing Carlsberg beer itself. Plaintiffs contend that this is the type of injury that the antitrust laws were designed to prevent because the defendants' conduct reduced inter-brand competition. Defendants argue that plaintiffs are simply alleging an injury because of termination of their distributorships and that such an injury could have occurred even if a defendant

with a lesser market share took over plaintiffs' distributorships.

I agree with the defendants that the injury plaintiffs suffered is not an antitrust injury for purposes of standing under the Clayton Act. Although plaintiffs contend that there is a reduction of inter-brand competition, plaintiffs' injury does not flow from the reduction in competition but rather from the fact that their distributorships were terminated. Thus, while plaintiffs may be injured 'by reason of' the unlawful acquisition, their injury did not occur 'by reason of' that which made the acquisition unlawful. Brunswick, 429 U.S. at 488 [FN1] See also Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484 (1986).

Plaintiffs argue that by entering into this arrangement with Carlsberg, A-B violated a consent decree which prohibited A-B from marketing any brand of beer of another brewer. Plaintiffs contend that they were injured by reason of something forbidden in the consent decree and that they therefore suffered antitrust injury. Although A-B received a 'no objection' letter from the Justice Department regarding their arrangement with Carlsberg, plaintiffs argue that the Justice Department based its decision on a letter from counsel for A-B which contained misrepresentations. The basis of plaintiffs' claim that A-B violated the consent decree appears to be plaintiffs' contention that A-B misrepresented to the Justice Department the fact that Carlsberg beer was being

distributed in the United States. In fact, however, the letter from A-B's counsel states that Carlsberg beer was being sold in the United States. Moreover, the evidence shows that, as stated in A-B's letter to the Justice Department, the Carlsberg-All Brand distributorship contract was terminated effective December 31, 1984. See letter attached to letter to this court from Scott E. Flick, (Apr. 16, 1987).

In conclusion, plaintiffs have not alleged an antitrust injury and they have no standing to assert a claim under the Clayton Act. Accordingly, summary judgment shall be granted in favor of defendant Anheuser-Busch on Count VIII of the amended complaint.

## IV. MISREPRESENTATION CLAIM

In Count IV of their amended complaint, plaintiffs allege that defendants committed the tort of misrepresentation under Pennsylvania law in failing to disclose to plaintiffs the fact that their distributorships were to be terminated. Plaintiffs contend that defendants deliberately concealed this information so that plaintiffs would continue promoting Carlsberg products. Defendants contend that silence is actionable only where defendants are under a duty to disclose and that they were under no such duty in this case.

The elements of an action for fraud are (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the

recipient upon the misrepresentation and (5) damage to the recipient as the proximate result. Scaife Co. v. Rockwell-Standard Corp., 446 Pa. 280, 285, 285 A.2d 451, 454 (1971), cert. denied, 407 U.S. 920 (1972). Nondisclosure of a material fact is as much a misrepresentation as an intentional affirmation of material falsity. Neuman v. Corn Exchange National Bank & Trust Co., 356 Pa. 442, 51 A.2d 759 (1947).

Pennsylvania law is in accord with section 551 of the Restatement of Torts, Second, which 'accords liability for nondisclosure only if the parties are engaged in a business transaction or stand in a fiduciary relationship.' Chrysler Credit Corp. v. First Nat'l Bank & Trust Co., 746 F.2d 200, 207 (3d

Cir. 1984) (adopting district court opinion as its own). [FN2].

With regard to defendant A-B, there is no evidence that plaintiffs and A-B were engaged in a business transaction or that they stood in a fiduciary relationship. Therefore, there can be no liability for non-disclosure and summary judgment must be granted in favor of A-B on this count. Plaintiffs and defendant Carlsberg were, however, involved in a business transaction. Thus, while Carlsberg may move for summary judgment on this claim on other grounds, at this time summary judgment must be denied as to Carlsberg on the misrepresentation claim.

V. PENNSYLVANIA LIQUOR CODE CLAIM

Plaintiffs allege that defendants terminated their

distributorships in violation of the Pennsylvania Liquor Code ('the Code'). Specifically, plaintiffs claim that Pa. Stat. Ann. tit. 47 s 4-431 (Purdon Supp. 1987) obligated Carlsberg to continue selling its products to plaintiffs and that section 4-492(19) required A-B to take the plaintiffs' orders. Defendants argue that these provisions have no applicability to this case.

Section 4-431 deals with malt and brewed beverage manufacturers', distributors' and distributors' licenses. Plaintiffs contend that section 4-431 should be construed to cover all non-Pennsylvania manufacturers. I cannot agree. The Code distinguishes between 'manufacturer' and 'manufacturer of malt or brewed beverages'. See Pa. Stat. Ann. tit. 47 s 1-102. Section 4-431

applies only to manufacturers of malt and brewed beverages. Although s 4-431(d), which govern distributing rights, uses the word manufacturer, that section also establishes that it is referring to 'distributing rights as hereinabove required', which means the distributing rights which must be given by manufacturers of malt and brewed beverages, as set forth in section 4-431(b). Because it is undisputed that Carlsberg is not a manufacturer of malt and brewed beverages as defined by the Code, section 4-431 does not apply to Carlsberg.

I do not agree, however, that section 4-492(19) has no application to this case. Section 4-492(19) provides that is shall be unlawful '[f]or any manufacturer of any officer, agent or representative of any manufacturer to

modify, cancel, terminate, rescind or not renew, without good cause, any distributing rights agreement' and further establishes notice requirements. Pa. Stat. Ann. tit. 47 s 4-492(19). Because this section uses the term 'manufacturer', it appears that this section applies to the distribution agreements between plaintiffs and Carlsberg. Defendants argue that, despite the plain meaning of the statute, 4-492(19) is not applicable. They contend that 4-492(19) is no broader than 4-431, which applies only to manufacturers of malt or brewed beverages, relying on Rudolph Rosa, Inc. v. LaTrobe Brewing Co., 347 Pa. Super. 551, 500 A.2d 1194 (1985), appeal denied, (Pa. 1986). In Rudolph Rosa, the court reconciled an inconsistency between section 4-492(19) and section 4-

431(d)(5). The court held that while 4-492(19) stated that the 'for cause' requirement applied to all manufacturers, it should not be applied to Pennsylvania manufacturers, which the legislature had expressly excluded from the 'for cause' requirement under 4-431(d)(5). In the instant case, however, the statutory provisions at issue may be interpreted consistently. As plaintiffs observed during oral argument, section 4-431 simply states that manufacturers of malt and brewed beverages must give distribution rights. Because Carlsberg was not a manufacturer of malt or brewed beverages under the Code, it did not have to give such rights to plaintiffs. However, once it gave such distribution rights, section 4-492(19) provides that Carlsberg could not take away those rights without the

'for cause' and notice requirements established by that provision. This is a consistent interpretation of the provisions and is in accordance with their plain meaning. 'When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.' 1 Pa. Con. Stat. Ann. s 1921(b) (Purdon supp. 1987).

I agree with defendants, however, that section 4-492(19) does not apply to the claims of plaintiffs Liberty Bell, Galli and W&L. The distribution rights of these plaintiffs were created in 1979; the Liquor Code amendments became effective in August, 1980, and the amendments are not retroactive. See Centre Beverage Co. v. Miller Brewing Co., 779 F.2d 168, 170 (3d Cir. 1985); Rudolph Rosa, 347 Pa.

Super at 563, 500 A.2d at 1200. Plaintiffs argue that although these plaintiffs initially entered into an arrangement with Carlsberg in 1979, that the agreements changed over time because Carlsberg's agent was replaced, and that, in fact, Liberty Bell and Galli entered into new written agreements after the dates of the amendments to the Code. As defendants argue, however, the evidence shows that although the agent changed, the agreement between plaintiffs and the various agents remained virtually the same. See, e.g., def. ex. J no. 20; ex K; ex. L. Given that there was no significant change in the agreements as the agents changed, plaintiffs' distributorships are essentially a result of one continuous agreement which began in 1979; thus, the amendments to the Code do not apply.

See Bitronics Sales Co. v. Microsemiconductor Corp., 610 F. Supp. 550, 556-57 (D. Minn. 1985), and cases cited therein. Plaintiffs argue that Bitronics is distinguishable since in that case, a continuous relationship between a buyer and a seller existed. However, plaintiffs contend that at all times, the agents were Carlsberg's alter ego. Amended Complaint PP45, 49, 61. Thus, despite the fact that the agent changed, plaintiffs were at all times dealing with Carlsberg.

As to A-B, defendants argue neither section 4-492(19) or section 4-431(d)(3) imposes an obligation on A-B since plaintiffs were terminated prior to the time A-B entered into a relationship of any sort with Carlsberg. I do not think it is clear, from the evidence presented, at what point

plaintiffs were terminated. For example, although Carlsberg made its last shipment to plaintiff L&M Beverage on February 11, 1985, that does not establish that L&M was terminated on that date, and I believe a better record is necessary before I may determine when plaintiffs were actually terminated.

In conclusion, I grant defendants' motion for summary judgment on Count II as to plaintiffs Liberty Bell, Galli and W&L.

An order reflecting all that I have stated in this memorandum follows.

ORDER

Upon consideration of defendants' motion for partial summary judgment, plaintiffs' response thereto,

the supplemental memoranda and the oral argument, IT IS ORDERED that the motion is GRANTED IN PART and DENIED IN PART.

1. Summary judgment is GRANTED in favor of defendant Anheuser-Busch, Inc. and against plaintiffs on Count VIII (Illegal Acquisition) of the amended complaint.

2. Summary judgment is GRANTED in favor of defendant Anheuser-Busch as to Count IV (Fraudulent Misrepresentation) of the amended complaint.

3. Summary judgment is GRANTED in favor of defendants and against plaintiffs Liberty Bell, Galli and W&L as to Count II (Breach of Contract) of the amended complaint.

4. In all other respects, summary judgment is DENIED. IT IS SO ORDERED.

FN1 In support of their contention of antitrust injury, plaintiffs rely primarily on South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934 (1966), which is neither binding nor persuasive in light of the fact that it pre-dated the Supreme Court's decision in Brunswick. Although plaintiffs initially argued that Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) provided the appropriate background for analyzing this claim, at oral argument, plaintiffs agreed that Brunswick was the correct case to apply here. Oral arg. tr. at 26.

FN2 Although defendants argue that there is no duty to disclose in the absence of a confidential relationship, Chrysler Credit Corporation establishes that liability may arise from nondisclosure, in appropriate circumstances, if the parties are engaged in a business relationship. Moreover, other cases have found liability for nondisclosure when the parties were involved in a business relationship, but not a confidential relationship. See, e.g., Marian Bank v. International Harvester Credit Corp., 550 F. Supp. 456 (E.D. Pa. 1982), aff'd., 725 F.2d 668 (3d Cir. 1983).